CIV/T/274/91

IN THE HIGH COURT OF LESOTHO

In the matter between:

TŠEPO SEKHESA PLAINTIFF

V

LESOTHO NATIONAL INSURANCE COMPANY DEFENDANT

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 1st day of August, 1994.

This is a claim under the *Motor Vehicle Insurance Order* No.18 of 1972

On the 14th June, 1994, the Court heard argument on two special pleas of the Defendant. Plaintiff's claim against which these special pleas are directed is for,

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"(a) Payment in the sum of M61,600-00 as loss of assistance in maintaining the children and funeral expenses aforesaid;

(b) Interest thereon at the rate of 17% *a tempore morae*;

(c) Costs of suit;

(d) Further and/or alternative relief."

The claim is a consequence of the collision between a vehicle insured by Defendant and Plaintiff's wife who suffered from it fatal injuries from which she died.

Summons were issued on the 5th July, 1991 when the collision had occurred on the 8th July, 1989.

Section 13(2) of the *Motor Vehicle Insurance Order* No.18 of 1972 provides,

> "The right to claim compensation under Sub-section (1) from a registered company shall become prescribed upon the expiration of two

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invited in the main premise to take the 5th June, 1991 as the date on which the claim was delivered. I am similarly being invited to pay attention only to the 9th July, 1991 which is the date on which the summons were served on the Defendant and ignore the 5th June, 1991 which is the date on which the summons were filed in court.

The two special pleas state:

"FIRST SPECIAL PLEA

1.1 the cause upon which the Plaintiff's action is based arose on the 8th July 1989, being the date of death of Mantolo Sekhesa.

1.2 The claim in the prescribed form which Plaintiff was required to deliver to Defendant in terms of section 14 of the Motor Vehicle Insurance Order 18 of 1972 as amended, was delivered to the Defendant on the 5th June 1991, alternatively, 20th May 1991, as per annexure "A" hereto.

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1.3 Summons was served upon the Defendant on the 9th July 1991.

1.4 The Defendant pleads that the period of 60 days which must be allowed in terms of Section 14(2) of the Motor Vehicle Insurance Order had not expired when Summons in this action was served on the Defendant.

1.5 In the premises, the Defendant pleads that Plaintiff's claim is unenforceable and the Summons is a nullity.

WHEREFORE DEFENDANT prays that Plaintiff's claim be dismissed, with costs.

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SECOND SPECIAL PLEA

The Plaintiff served a further Summons upon the Defendant on the 24th September 1991 and in

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respect of the second Summons the Defendant pleads that the Plaintiff's claim prescribed prior to the second service of Summons on the 24th September 1991 and that the Plaintiff's claim has thus prescribed in terms of section 13 and 14 of the Motor Vehicle Insurance Order 18 of 1972.

WHEREFORE DEFENDANT prays that Plaintiff's claim in her personal capacity and representative capacity, alternatively, in her personal capacity alone has prescribed and that the claim should be dismissed, with costs."

Both special pleas are to the effect that the Plaintiff's claim has prescribed.

Mr. *Geldenhuys*, Counsel for Defendant, submitted at the beginning of his argument that Plaintiff's claim had prescribed on the 9th July, 1991 because Defendant was served with summons on that day. I had difficulty with this submission because in Lesotho summons sometimes take nine months to serve despite the fact that the Registrar

has been written several reminders urging that summons be served.

Defendant had omitted to annex the documents on which his special pleas as amended are based. These had been annexed to the original special plea. The Court considered them still part of the special plea. Consequently in the Court's view Defendant's oversight was not as prejudicial as it might have been.

It appears *Voet* 41·3·20 (*Gane's* translation) is of a different view and says,

> "Although of old an interruption of prescription by no means happened through a mere summons to law, it has nevertheless been said in our title to Judicial proceedings and Forum that by the latest law such a thing is enough."

It follows therefore that if summons are later served, prescription would not run. If I have understood Voet correctly, then prescription would not run where summons were issued before two years from the date on which the cause of action arose, so long as the summons are

eventually served on the Defendant. The action must of course be pursued until finality of some kind is reached. The issue of summons that eventually lapses because of Plaintiff's inaction is not enough. This is not the position in this particular case.

The next premise on which Mr. *Geldenhuys* based his first special plea is ground paragraph 1·4 and 1·5 of his First Special Plea which reads:

> "1·4. The Defendant pleads that the period of 60 days which must be allowed in terms of Section 14(2) of the Motor Vehicle Insurance Order had not expired when summons in this action was served.
>
> 1·5 In the premises, the Defendant pleads that plaintiff's claim is unenforceable and the summons is a nullity.
>
> WHEREFORE Defendant prays that Plaintiff's claim be dismissed with costs."

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This Special Plea was first filed on 16th September, 1991 and it is part of the amended plea filed on 14th january, 1991.

The Second Special Plea merely states that inasmuch as the Summons were served the second time on the 24th September, 1991, prescription had barred Plaintiff's right to sue.

In *Hartley v Umkanganyeki* 10 NLR 49 at 51 Connor CJ said:

> "It may perhaps have to be admitted that for an interpellation to have constituted by Roman-Dutch law an interruption of the course of prescription an actual *litis contestatio* between the parties was not requisite, but a legal summoning was sufficient—an *in jus vocatio* (Voet 41•3•20 at 5•1•49)."

It seems to me, since in Lesotho we have had no Prescription statute that obliges us not to follow the Common Law as inherited from the Cape, we are obliged to follow *Voet* as I have already stated.

In *Wilderness* (1921) *Ltd v Union Government* 1927 CPD 455 at 461 Benjamin J cited with approval an old case of

Van Schalkwyk v Hugo (Foord p.92) and said:

> "It is clear law that the issue of summons interrupts the running of prescription."

In the case of *Schalkwyk v Hugo* (Foord 89) at page 92 De Villiers CJ had said:

> "...A creditor can only prevent the term of prescription from running by means of judicial appellation against the debtor. For that purpose a summons to appear in a Court having jurisdiction is sufficient. Upon these matters I can only refer to Voet 41•3•20 and Act 6 of 1861 (Sec 7)."

Section 7 of the *Cape Prescription Act No.6* of 1861 which is still the current law of Lesotho,provides that law does not alter the law that existed in 1861 in staying or interrupting the course of prescription.

That being the case our Lesotho prescription is interrupted by the issuing of summons and not by the service of summons as the current South African law does.

There are a number of cases that were decided long after Lesotho had broken away from the Cape. These cases interpret the *Motor Vehicle Insurance* legislation read along with the South African Prescription Acts of recent origin. These state that prescription is to run from the service of summons while in Lesotho it still runs from the date when summons were issued.

Mr. Geldenhuys referred me to the case of *Marine and Trade Insurance Co. Ltd. v Reddinger* 1966 (2) SA 407 AD. It was on the basis of this case that I was urged to dismiss Plaintiff's claim. Plaintiff's summons had been served prior to the expiry of 60 days prescribed by the Motor Vehicle Insurance legislation. The Court held that a summons which has been so served is not a nullity and there is no objection to the re-service of a properly issued summons without leave of court. The view Wessels JA took is summarised at page 414 G-H of his judgment as follows:

> "In my opinion the terms of the sub-section do not provide support for the far-reaching contention that legal proceedings commenced by the proper issue of summons are invalidated *in toto* and rendered incapable of

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> correction because the summons is prematurely served."

In the case of *Mamokhethi Mokhethi v Lesotho National Insurance Co.* CIV/APN/57/86 (unreported) dealing with prescribed third party claims, Kheola J (as he then was) said:

> "The South African Act 56 of 1972 as amended provides for a Court relief of a prescribed claim if a third party satisfies the Court that by reason of special circumstances he could not reasonably be expected to comply with the said provision before the date on which the claim became prescribed... As the Lesotho Motor Vehicle Insurance Order has no such provision this court cannot give any relief on a prescribed claim because that would amount of overruling an Act of Parliament..."

That in my view (by implication) means that since prescription would have a finality which in South Africa no more exists, the Courts in Lesotho would interpret a similar section less strictly than it would have done if it did not shut the door in the face of Plaintiff. In this case (because prescription was interrupted) I am not obliged to do so.

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The South African case that is on all fours with this one is that of *SANTAM Insurance Co. Ltd. v Vilakazi* 1967(1) SA 246 AD. In that case, Plaintiff (could be said to have) served summons prematurely before the stipulated sixty days had expired. The view that was taken by the majority of the Appellate Division was that premature service cannot institute an action and therefore does not interrupt prescription. This view was based on a South African *Prescription Act* of 1943 which has no application in Lesotho. Where a court in Lesotho has to deal with a case involving prescription, it has no option but to resort to the Common Law of Lesotho as the old *Cape Prescription Act* of 1861 which is still law in Lesotho applies has stated.

Holmes JA in *SANTAM Insurance v Vilakazi* at page 252 B said this about the suspension of actions during the 60 days:

> "The purpose is to allow the insurance company 60 days in which to consider the claim before becoming involved in litigation."

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Wessels JA in *Marine and Trade Insurance v Reddinger* 1966(2) SA 407 at 415H and 416A said:

> "The summons could stand and service thereof could be effected afresh notwithstanding the fact that there had been a premature service. With this view I respectfully agree. It is not necessary for purposes of this judgment to deal with the question whether or not a premature service will interrupt the running of prescription."

It will be observed that in *SANTAM Insurance Co. Ltd. v Vilakazi* at 253A Holmes JA said:

> "I would add that there is no prejudice to the insurance company if the claimant issues, as distinct from serving his summons before delivering the particulars of claim; for the mere issuing is not an act which involves the defendant.

I have already distinguished the legal position in Lesotho from the South African one in South Africa Section 6(1)(b) of their *Prescription Act* of 1943 states extinctive prescription shall be interrupted by service on the debtor of any process whereby action is instituted. In Lesotho filing an action in court is enough.

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At page 412H and 413A of *Marine and Trade Insurance Co. Ltd. v Reddinger*, it will be observed that relying on the said South African Prescription Act:

> "the service of summons and not its issue, was to be regarded as the commencement of legal proceedings."

According to the old Cape Law up to 1884 (which is now the Common Law of Lesotho) the position is the opposite. The issue of summons, not its service, constitutes commencement of legal proceedings. That being the case, both the majority decision in *SANTAM Insurance Co. Ltd. v Vilakazi* and *Marine Trade Insurance Co. Ltd. v Reddinger* if applied to Lesotho would not have the same result as they produced in South Africa. They would lead to the decision that the present claim of Plaintiff has not prescribed.

In argument, Mr. *Geldenhuys* referred me to the case of *Mokhethi Mokhethi v Lesotho National Insurance Co.* CIV/APN/57/86 (unreported). In that case, *Kheola* J (as he then was) rejected Mr. *Kambule's* argument to the effect

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that this Court has under the Common Law the power to condone failure to institute legal proceedings timeously. *Kheola* J concluded:

> "The South African Act 56 of 1972, as amended, provides for a relief of a prescribed claim if the third party satisfies the Court by reason of special circumstances he could not have reasonably been expected to comply with the said provisions before the date on which the claim prescribed... As the *Lesotho Motor Vehicle Insurance Order* of 1972 has no such provision this court cannot give any relief of a prescribed claim because that would amount to overruling an Act of Parliament which clearly set out the period within which a claim must be brought."

I agree with this judgment but the facts are entirely different. In that case the MVI 13 claim was lodged for the first time almost a month after the two years prescription had run. In this case the MV1 13 claim was lodged a month and a half before the date of prescription. Summons were issued two days before the date of the two years prescription. What is in issue here is whether it was right for Plaintiff to issue summons before the end of the 60 days (that Defendant is given by law) to consider the claim.

Prescription means the limitation of time within which actions may be instituted. Snyman and Gordon *The Law of Compulsory Motor Vehicle Insurance* 2nd Edition by Gordon and Odes at page 182 state:

> "A problem which has faced the courts is the manner in which the prescriptive period of two years is to be calculated."

The learned authors note the disagreements over interpretation that have existed in South African Courts over the years.

Among other things the learned authors note that for over twenty years between 1942 and 1963 there was uncertainty on the question whether or not minority suspended prescription in respect of claims of children in terms of the Motor Vehicle Insurance legislation. The question was only finally settled by the Appellate Division in favour of minors in *President Insurance Co. Ltd. v Yu Kwan* 1963(3) SA 766. Lesotho (as already stated) is not bound by South African decisions even on identical laws. Such decisions are only highly persuasive. Following South African decisions blindly

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would create more problems than it would solve for this country.

In the case of *K.M. Lerotholi v The Medical, Dental and Pharmacy Council of Lesotho and Other* C of A (CIV) No.22 of 1989 (unreported) *Ackermann* JA quoted the following passage with approval:

> "The mere fact that the result of a statute may be unjust or absurd does not entitle this Court to refuse to give it effect, but if there are two different interpretations of the words in an Act, the Court will adopt that which is just, reasonable and sensible rather than that which is none of those things."

It seems to me very clear that the prescription period stipulated in *Section 13(2)(a)* of the *Motor Vehicle Insurance Order* of 1972 is "two years from the date upon which the claim arose." It is certainly not two years and sixty days. That being the case I had great difficulty with the suggestion that implied that I should ignore this particular Section.

Section 15 of the *Interpretation Act* of 1977

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provides:

> "Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

Section 14(1) of the *Motor Vehicle Insurance Order* of 1972 directs that the claim be made in a prescribed form whose receipt by insurance company shall be acknowledged in writing by the insurance company together with the date of that receipt. This in my view is meant to make sure that the date of receipt of the insurance claim can never be the subject of dispute. The reason being that in the case of sending it by registered post, there will be a registered certificate of posting of the claim. The problem only arises with the effect of the 60 days' period provided for in *Section 14(2)*.

The words on which Mr. *Geldenhuys* relies in urging this court to shut the door to the Plaintiff's claim which are found in *Section 14(2)* of the *Motor Vehicle Insurance Order* of 1972 are the following:

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> "No such claim shall be enforceable by legal proceedings commenced by a summons served on the registered company before the expiration of a period of sixty days from the date on which the claim was sent or delivered..."

If *Section 14* is read together with *Section 13((2)* there are no problems or should be no problems which Defendant had in this case because the prescribed expiration period of two years is deemed to be "suspended during the period of sixty days referred to in subsection (2) of section 14". I should have thought the key words are, "enforceable by legal proceedings", because that is what the proviso of *Section 13(2)(a)* has suspended for 60 days. If that is correct even if summons had been served the action would be frozen. *Lehohla* J's *caveat* in *Rex v Thosi Andreas Molebatsi* Review Order Number 1/87 becomes particularly relevant where dealing with the blind and unwary following of South African authorities he said:

> "Far be it for me therefore to subscribe to the view that because our courts have regularly followed South African authorities they must do so slavishly..."

Therefore when Lesotho has chosen to follow South African

authorities this is done where and if the presiding judge is persuaded that it is correct. *Rooney* J in *Masefatsana Moloi v Minister in Charge of Police & Others* CIV/APN/203/81 (unreported) interpreting internal security legislation on access to political detainees followed the minority judgment of *Rumpff* JA and *Williamson* JA in *Shermbrucker v Klindt NO* 1965 (4) SA 606 at 621 where he felt the wrong extra-ordinary intention was being imputed to the legislature.

I have already distinguished this case from that of *SANTAM Insurance Co. Ltd. v Vilakazi* on institution of legal proceedings because Lesotho's law differs from South African law on prescription. The view I would have taken, (had the prescription laws been the same) would have been the one taken by the dissenting judgment of *Trollip* JA who held that prescription had not run against plaintiff in circumstances that are identical to the present case.

Trollip A.JA after discussing several other authorities at page 262C of *SANTAM Insurance Co. Ltd. v Vilakazi* concluded:

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> "Normally the formal, prescribed claim should first be furnished to the company and the ensuing 60 days should expire before summons is issued and served, but the section does not preclude the issue and service of the summons before then, it only stays legal proceedings so commenced until the formal claim is furnished and the ensuing 60 days has expired; and such premature service of summons does interrupt prescription..."

I have already shown that in Lesotho there is no similar statutory provision that makes service the mandatory cut-off point for the purpose of interrupting prescription.

It seems to me that because South African decisions are persuasive not binding, (even assuming the prescription law had been the same), I would follow the dissenting judgment of *Trollip* JA in *SANTAM Insurance Co. Ltd. v Vilakazi*. It also seems to me therefore that prescription has not run against Plaintiff's action.

There is also the element that prescription does not run against minor children. *Section 6* of the *Prescription Act* of 1861 of the Cape which is still the current law of Lesotho clearly exclude minors and persons under legal disability from the operation of prescription.

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Under the common law, prescription cannot run against minors. Since the case of *President Insurance Co. Ltd. v Yu Kwan* 1963 (3) SA 766 whatever doubts that existed about the two-year prescription running against minors in South Africa have been resolved. They are seen as people under disability. Maintenance is the right of children not their father. In *President Insurance Co. Ltd. v Yu Kwan* at page 782 A-C *Williamson* JA after reviewing the authorities dealing with similar provisions of the *South African Motor Vehicle Insurance Act* of 1942 concluded:

> "The result is that I am of opinion that...the running of prescription...against a minor who has a claim under Section 11(1) of the Act against a registered company is suspended during minority... In the circumstances I do not agree that the claim of respondent's minor child against appellant has become prescribed."

I note further that *Aaron* JA in *Malee E. Putsoa v The Attorney General* C of A (CIV) No.1 of 1987 (unreported) dealing with a situation not dissimilar to this one said:

> "...It is common practice for a creditor to preserve his rights and avoid prescription by taking the formal step of issuing summons..."

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It seems to me that is what Plaintiff did as he had submitted his claim late. It seems Defendant never bothered to respond to Plaintiff's MV1 13 claim. If he had responded to it he could be morally justified in arguing that there was no action pending in the eyes of the law. It seems to me Defendant was determined not to leave a stone unturned to avoid its legal obligations.

Courts in the case of Exceptions where a pleading is vague and embarrassing have required parties to give the other side an opportunity to remedy the situation. In the case of prescription where the statute or the Common Law operates it seems parties feel they can use any legal device to frustrate each other. This is far from the spirit of co-operation in the conduct of litigation that *Aaron* JA recommends in *Malee E. Putsoa v The Attorney General* (supra). I can only add that in my experience in cases such as this one, prescription has sometimes been extended by consent of both parties. Although parties are entitled to demand every pound of flesh that the law entitles them (in cases involving the maintenance of children and the weak) it goes against the grain.

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Mr. *Nathane*, Counsel for Plaintiff, referred me to the case of *Commercial Union Assurance v Clarke* 1972 (3) SA 508 at 515H where *Holmes* JA interpreting the word "sent" in a Section identical to *Section 14(1)* or the *Lesotho Order No.18* of 1972 said:

> "There is no peculiar magic in the company's having 60 days at its disposal. It is *prima facie* a generous period, doubtless selected for a contingency of the claim taking a matter of days to arrive after posting."

Mr. *Nathane* consequently could not understand why the company ought to have all the 60 days at its disposal in order to consider the claim. I do not see it either. All that happens is that the purpose of the Order is lost and the requirement that this enactment should be "given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects" in terms of *Section 15* of the *Interpretation Act* of 1977 is lost. I do not see what this narrow and restricted interpretation that is being urged on the Court would achieve having regard to the peculiar facts of this case.

In the light of the aforegoing, the appropriate order

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is:-

Defendant's First and Second Special Pleas are dismissed with costs.

It is so ordered.

W.C.M. MAQUTU
JUDGE